PROPOSED METHODS OF BALLOT SIMPLIFICATION

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You have been hearing about the need for a simplification of the ballot by a reduction in the number of elective offices, and the general argument for "the short ballot" is fresh in your minds. The part which has been assigned to me, as I take it, is to suggest an answer to the first question which the practical man invariably asks: "How are you going to put this principle into operation? Just which offices will you take off the ballot and which will you leave on."

Now I need hardly spend much time explaining that to attempt to answer this question satisfactorily I shall have to go rather far afield and discuss some things which at first sight have little to do with ballot reform. The actual shortening of the ballot in any state will require more or less extensive statutory and constitutional changes. For this sort of work the mere principle that elective offices should be as few and as important as possible is not a sufficient guide. One must have some further criterion by which to determine exactly which offices shall be elective, and which shall be filled in other ways. From the practical point of view, again, if it be decided that a particular officer is no longer to be chosen by the people—or by those who, in our current political comedy, play the part of the people—some other method of selection must be proposed which promises at least as good results. In short, one must come pretty close to outlining a complete new governmental structure for the state, and a structure which will commend itself for other reasons than its mere relation to the ballot. Within the limits of this paper I shall not attempt so ambitious a program, but shall merely suggest as a basis for discussion certain general rules as to what officers should be elected, and then, applying these rules in a few specific instances, try to determine how far they must be modified to fit existing conditions.

One rule, which expressed in general terms, seems to be fairly widely accepted, is that policy-determining officers should be elective (and when I use the word elective without qualification, I mean elective

by the people), and that officers who merely execute policies, without any share in determining them, should be selected by some other method. Mr. Dorman B. Eaton stated this in more detail when he said that we should elect those officers,

who frame or amend constitutions; who direct political policy; who make, interpret or repeal the laws; who adopt city ordinances; who control taxation, or who direct the expenditure of money[1]

To try to establish this rule as a general lesson of political experience would open up too many questions. It would also be rather unnecessary, as most of those present would probably accept it more or less completely if the question were now put to them. Without attempting, therefore, to discuss its general validity, let us adopt it as our starting point.

Before going further, however, let us try to make the rule a little more definite. It is sometimes taken for granted, in discussing the question as to which officers should be elective, that the two primary functions of determining policies and of executing policies—or, as Professor Goodnow has phrased it, of expressing the will of the state, and of executing the will of the state—are completely separated in their exercise and assigned to different organs. That which he has pointed out so clearly, and which is well recognized—namely, that the organs which are primarily policy-executing often discharge policy-determining functions—seems in this connection to be somewhat overlooked. Yet it has a most important bearing on our present discussion. Take, for example, such facts as that, in actual practice, the chief executives of the several states are becoming more and more policy-determining officers; that the supreme court of the United States is coming to be spoken of as if it exercised the functions of constitutional convention and legislature combined, in addition to its own; and, to drop from a great height to matters near home, that sheriffs and district attorneys determine to a great extent under what laws the inhabitants of their respective counties shall actually live. In the light of these facts, how is our general rule to be interpreted? Is it to be understood as meaning that officers should be elective only when their duties are formally and exclusively policy-determining, or is it the *actual* power to determine policy, irrespective of the nominal character of a given office, that we should take as our criterion? Here, again, there is room for discussion; but since it is

[1] *The Government of Municipalities*, p. 460.

the working realities of government that are of prime importance, rather than its mere boundaries on paper, I think we are forced to choose the latter alternative. I shall, therefore, re-state our general rule as follows: Wherever an officer, under actual conditions, and irrespective of the formal limits of his office, regularly exercises independent policy-determining functions, there you have a prima facie case for his election by the people.

But our rule as thus stated, if applied without qualification, would force us to rather peculiar conclusions. It might compel us here in New York state, for example, to demand the popular election of the clerk of the assembly. Manifestly it must be limited in some way, and a discrimination made between officers for whose actual policy-determining power some legitimate and reasonable basis can be found, and those whose exercise of such power is admittedly improper and illegitimate. Now among students it will probably be granted that, within any particular sphere of governmental action—federal, state, county or municipal—the power to determine policy should not be widely diffused among a number of independent, coördinate officals, but should be as far as possible concentrated. As Woodrow Wilson has put it:

> A government must act by some combined force which is the will of one person, or the will of many persons united,. . . . Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for, and you will not have a democratic government.[2]

Some would go even further and lay it down as a hard and fast rule that in each sphere there should *never* be more than *one* controlling authority. Whether we go as far as this, or not, it is at least evident that the prima facie case for the popular election of any given officer may be rebutted by showing that his power to determine policy, on which the case is based, is itself indefensible. In other words, instead of being forced, wherever policy-determining power actually exists, to demand popular election as the logical corollary, it is always in order to avoid this necessity by showing that the power itself should be removed.

But here comes in another question. In any given instance, is it possible, as a practical matter, to remove it? In some cases this is

[2] Civic Problems—Address delivered March 9, 1909, at the Annual Meeting of the Civic League of St. Louis, pp. 3 and 8.

simple enough. Where, for example, the policy-determining character of the office is due to no other cause than the fact that it is now elective, the mere act of making it appointive accomplishes all that is necessary, and carries with it its own justification. Where the actual power to determine policies, however, is the result of other and more complicated conditions, unless we can find means to remove these conditions, the prima facie case for popular election remains unaltered.

So much for our general principle, and the qualifications under which I shall try to apply it. It must always be remembered, however, that, in attempting to decide whether any given office should be elective or appointive, special considerations may enter in that will far outweigh the general considerations above outlined. One must take account of such facts as the existence of great extra-legal organizations such as political parties, and their relation to the regular organs of government: of the delicate and gradually-evolved adjustment of these organs of government to one another; and even of the ingrained habits of political thought and action in the community which affect the whole working of governmental machinery. Conditions along any of these lines *may* conceivably be such as to render it inexpedient to make a particular office appointive, even though the latter be as devoid of all independent policy-determining power as that of a court clerk or the keeper of a county jail. Such conditions, again, may be temporary and easily overcome, or they may be deepseated and, for all practical purposes, unalterable. In any case, until we can overcome them, the proposal to make the given office appointive, however unanswerable from other points of view, must remain in abeyance.

We are now ready to take up certain specific offices and classes of offices, to inquire what our general principle means when applied to them, and to determine how far, if at all, it needs to be modified to fit each particular case. Omitting the federal government—since in that field we already have the short ballot—the first office on our list is that of governor.

There can be little doubt at the present time that the governor, almost as much as the president, is in a very real sense a policy-determining officer. There is a real question, however, as to whether a coördinate power to determine policy—as distinguished from the power of proposing policies, subject to the final decision of the legislature —is one which the chief executive should properly exercise. The prin-

ciple that the ultimate control, within the sphere of the state government, should be as far as possible concentrated would, if carried to its logical extreme, lead us to give the appointment of the governor to the legislature, as under the parliamentary system. Assuming for a moment that this would be the most desirable course, the practical question then arises—could we, by this action alone, deprive the governor of his independent policy-determining power, and limit him to the formulation and suggestion of policies? In other words, would the provision for his appointment by the legislature remove the prima facie case for keeping him elective. I think there is good reason to believe that it would not. The predominance of the executive over the legislature at the present time in the final and effectual (if not in the temporary or detailed) determination of policies is due to a far-reaching combination of causes, and would, I believe, continue (though to a less degree), even if his appointment were given to the legislature. The process which, according to Sidney Low,[3] is making the little group of leaders within the English cabinet more and more the masters, rather than the agents, of parliament, and turning parliament into a mere recording machine to register the decisions of those whom the electorate has really chosen, would be even more likely to follow if the parliamentary system were adopted in this country. It is an increasingly marked peculiarity of American political psychology that we prefer to concentrate our interest and attention on a single conspicuous leader, rather than on a legislative body. It has been said that this is because we are tired of the obstruction and "stand-pattism" that have resulted from our check and balance system, and from the character of our party machinery, and are in a hurry now to "get things done."[4] However this may be, the executive in whatever manner he might be chosen, would probably continue to monopolize popular interest, and, through his prestige and influence, to exert almost as great an effect on the determination of policy as he does at present. It is hard, indeed, to see by what means this character could be taken away from him. The prima facie case for popular election, therefore, would remain, and even if the legislature's part in choosing him should become as perfunctory, and as subordinate to a popular mandate, as that of the college of electors at the present time, there would still be no reason, according to our general

[3] *The Governance of England*, passim.

[4] Cf. J. T. Young, The Relations of the Executive to the Legislative Power; *Proceedings of the American Political Science Association*, 1904, pp. 49–51.

rule, for making the selection of an officer so vitally and increasingly expressive of the will of the voters even nominally more indirect than it is at present.

Moreover, looking at the practical side of the question, there is hardly a possibility that the proposal for the appointment of the governor by the legislature would ever be accepted by the voters. The proposition would come up against one of those ingrained habits of American political thought which are too strong to be overcome—at least, for as far ahead as we can see.

Even if one considered the parliamentary system superior to ours, therefore, one would be inclined to decide in favor of the retention of our present method of selecting the governor. The executive is already beginning to coöperate more and more with the legislature, and the desired concentration and unity of action, though still far off, are being wrought out before our eyes. For the student there is an additional inducement not to interfere, for it is far more fascinating to watch such a gradual process of adjustment than to apply any ready-made remedy—and one cannot help suspecting that the final outcome will be something quite different from the parliamentary system, and better suited to the America of the twenty-first century. It may be, too, that the legacy of the seven years ending March 4, 1909, has been a certain sporting spirit—a feeling that we shall get our money's worth better by keeping hands off and letting the executive and the legislature fight it out! However this may be, I think we may consider the popular election of the chief executive as res adjudicata for present purposes, and turn to the next office on the list.

In this case, I imagine, if students should vote to leave things as they are, it would hardly be from any intense interest in the lieutenant-governor, or in the spectacle of his constitutional development, viewed as a political, or as a sporting event. Seriously, it seems pushing theory pretty far if a merely contingent policy-determining character is to compel the popular election of an official whose ordinary duties as presiding officer—except where he appoints the committees of the senate—have little more to do with the determination of policy than those of the governor's staff. Suppose the secretary of state were to be appointed by the governor with the possibility in mind that the succession might devolve upon him. Would the likelihood of securing a capable successor in the governor's chair be greater or less than under the present system? But it is hardly worth while to discuss this office any further.

Let us take next a group of state officers—now generally elective—which includes the secretary of state, state treasurer, superintendent of public instruction, commissioners of public lands, agriculture, mines and railroads, trustees or regents of the state university, state engineer and surveyor in New York, and other positions of a similar character. The duties of these officers are mostly administrative in the strict sense of the term, and although some of them, for example railroad commissioners, have a considerable discretionary power in certain cases, and duties in regard to which the public holds strong views, they can be classed as policy-determining, if at all, only in so far as they are at present elective. The power to issue regulations is seldom possessed by any of these officers to more than a very slight degree, and if it should hereafter be conferred upon them, both our general theory and the example of the federal government would indicate that its final control should be as far as possible concentrated. This object could be accomplished, of course, merely by giving the governor the power of appointment and removal, and there would probably be fewer practical difficulties in the way of such a step in this case than in the case of any other officers. It would be almost impossible to discover any real distinction between the duties and general character of these offices on the one hand, and, on the other, those of the state superintendents of prisons, labor, charitable institutions, banks, insurance, or public works, the health and excise commissioners, and the large number of similar officers and boards who are now usually appointive. It would be interesting to see a comparison of the relative honesty and efficiency of the two sets of officers under the two different methods of selection. Very possibly such a comparison would not disclose any marked variation between them at the present time. However this may be, the pressure in the direction of more capable work in these departments, caused by the increasing technical demands made upon them, would probably be felt more readily by a single responsible appointing power than by those who now chose for us our elective officials.

In the case of one or two of the state officers somewhat different considerations enter in. Take first the attorney general. In his case there are peculiarly strong reasons, on the one hand, why the power of appointment should be given to the governor; and, on the other, certain arguments can be plausibly urged in favor of popular election. The former considerations were well presented in the New York constitutional convention of 1867, and subsequently came very

near prevailing as a result of the recommendations of the constitutional commission of 1872.[5] Their advocates, after citing the analogy of the president's cabinet, and recommending that the governor of New York be empowered to appoint most of the state officers and constitute them a cabinet to advise and assist him in the execution of the laws, went on to say that it was particularly important that the governor should be given the right to appoint the attorney general, since the latter was the head of the department upon which, above all others, devolved the duty of seeing that the laws of the state were properly enforced. It was absurd, they said, to hold the governor responsible for the execution of the laws, while denying him the appointment and removal of the officer upon whom he must chiefly rely in meeting this responsibility.

On the other hand, it is urged that, since the attorney general has the duty of prosecuting the other officers of the government in case of illegal action on their part, and of punishing political, as well ordinary criminal, offences, and since he is allowed a good deal of discretion as to whether or not to prosecute in any given case, he exercises independent policy-determining functions and should, therefore, be elected by the people. It is further asserted, from this point of view, that, if the governor were given the power to order the attorney general to prosecute in any case where he saw fit, and if it were made the duty of the latter to obey such order, as is now the case under the "executive law" of New York state,[6] the chief argument for his appointment by the governor would have been met. New York, however, has recently had an example of an elective attorney general out of harmony with the governor, and although, as far as the writer knows, no special crisis occurred to test this relationship, it was sufficiently evident to all that the mere formal. power of control would have been of little practical value, and that no loyal or efficient execution of the governor's policy could have been expected under such conditions.

In short, is not this one of the cases where such independent policy-determining power as now exists is improper, and should be removed? This could be accomplished by the mere act of making the attorney general appointive, since his policy-determining character is not due to any widespread or complicated causes. Our present inclination to make a distinction between the general duty of the governor to

[5] Cf. Lincoln, *Constitutional History of New York*, vol. ii.

[6] Consolidated Laws of 1909, ch. 18, art. 6, secs. 62 and 67.

see that the laws are faithfully executed, and the particular duty of the attorney general to prosecute for violations of them, is hardly more than a fortuitous outgrowth of the constitutional conditions with which we are familiar. It ought not, therefore, to be a difficult matter to persuade people to place the final control over this whole field of action in the hands of the governor, and hold him to an increased responsibility for its exercise.

As to the other argument in favor of election, it should be remembered that the governor, himself, while in office, is not liable to prosecution, and that the strongly partisan character which is the almost inevitable accompaniment of the actual process of popular election tends to prevent rather than to encourage a fearless and independent attitude on the part of the prosecuting officer toward his fellow officials. Besides, if it is once admitted that you must *elect* an officer to hold a club over other officers, why is it not logically necessary to elect still another officer to hold a club over him, and so on ad infinitum? The practical effect of this line of reasoning is, as Woodrow Wilson states it in the address above quoted:

> Put in other elected officers to watch those that you have already elected, and you will merely remove your control one step further away—

i. e., from the voters.

Somewhat similar considerations apply to the only other state office which I am going to discuss. This is the office of comptroller or auditor. It cannot be said that the holder of this office is in any true sense a policy-determining officer, yet it seems to be very widely believed that in his case an exception should be made to our general rule. All will agree that sound business experience requires us to keep him as far as possible independent of the rest of the state officers, upon the legal propriety of whose financial dealings he will have to pass judgment. The only question is as to how this independence may best be secured. Some will tell us that, in this country, the accepted way of making any officer independent is to elect him, and let him derive his authority from the people, just as do the chief officers of the government. But is this the practice in the business world? Is it the stockholders of a corporation themselves who engage an outside expert accountant to audit the accounts for the year? Or take the case of the federal government, or of England. In the federal government the comptroller of the treasury is appointed by the president and senate, yet

he occupies a peculiarly independent and responsible position, as far as his duties are concerned.[7] In the English boroughs, to be sure, the auditors are elective, but the comptroller and auditor general of Great Britain is appointed by the crown. He enjoys a life tenure like that of judges, and is removable only on address by both houses of parliament. If we wished to follow this latter model we could give our comptrollers and auditors a legally protected tenure during good behaviour; though it is probable that, instead of making them removable only by impeachment or on address by the legislature, it would be better to have them removable by the governor on the filing of charges, and after a hearing, as in the case of various local officers in New York state. Such a method would have its defects, but would be more likely in practice to produce independence and efficiency than is our present system.

In the case of all the state officers, in short, it is hard to see any reason why the general analogy of the federal government should not apply. This view (except as regards the state auditor or comptroller) has recently been taken in a very interesting document published in Oregon by the same group of men who secured the adoption in that state of the initiative and referendum, the direct primary, and the recall.[8] Coming from this source, such a proposal is particularly interesting, not merely because of the promise which it gives of concrete results, but because of its indication that this typical group of progressives do not consider a reduction in the number of elective offices undemocratic. The document in question contains, among other things, a draft of a number of amendments to the constitution of Oregon. Some of the sections of Article V. of this draft are, in part, as follows (certain provisions as to local officers and other matters being here omitted):

SECTION 5. The governor shall take care that the laws of this state be faithfully executed. . . . He shall have power to suspend or remove any officer he appoints and such suspension or removal shall not be subject to appeal; but in every such case he shall file his order of suspension or removal with the secretary of state, and also the reasons

[7] Cf. Fairlie, *The National Administration of the United States*, pp. 120–1; H. C. Gauss, *The American Government*, pp. 442–4.

[8] Introductory Letter, Additional Explanation, Bill for a Law and Suggested Amendments to the Constitution of Oregon; published by William S. U'Ren, Oregon City, Oregon; C. H. Chapman, Oregonian Bldg., Portland, Oregon; and others.

therefor upon written demand of the persons suspended or removed, or he may do so without such demand. . . .

SECTION 6. The governor shall appoint the attorney general, the secretary of state, state treasurer, state printer, superintendent of public instruction, secretary of labor, and the state business manager, who shall constitute the cabinet, together with such other cabinet officers as may be provided by law. They shall hold office during the governor's pleasure. These officers shall perform such duties as may be required by this constitution and the general laws, or ordered by the governor. A state auditor shall be chosen by the legal voters of the state at the general election in November, A. D., 1912, to serve two years. At the general election in November, A. D., 1914, a state auditor shall be elected for a term of six years. The auditor's regular term of office shall be six years and his duties, powers and salary shall be fixed by law.

SECTION 7. The governor and the members of the cabinet. . . . shall be citizens of the United States and of Oregon and shall have resided in the state not less than five years before their appointment, except that the governor shall not be limited to citizens of Oregon in employing the state business manager.

SECTION 8. The state business manager, subject always to the governor's approval, shall so organize, consolidate, supervise, direct and manage the business departments and affairs of the state (these being such as deal largely with money and money's worth) as to obtain the highest possible efficiency in the state's service and full value for the public money. He shall give counsel as to business matters when called upon by the chief officers of counties and other local governments. He shall advise the governor in writing of all possible opportunities and practical plans for the betterment of the public service, business and the methods and laws of its administration, both for the state and local governments. The governnor is authorized to make such rules and regulations as may be expedient to obtain these results, subject always to the constitution and laws of Oregon, and the decisions of the courts that any such rule or regulation is in contravention of the constitutional rights and liberties of citizens. The state business manager shall perform such other duties as may be required by law or ordered by the governor. The governor is authorized from time to time to allow and agree for such salary for the state business manager as will be sufficient to get the best man for the position, but subject always to reduction by the people on referendum vote.

It may be mentioned, as an interesting indication of the tendency of these proposals, that another section gives the governor and his cabinet the right to appear on the floor of either house of the legislature, to introduce and support "administration measures," which are to be officially known as such, and to submit to a referendum vote

of the people any administration measure rejected by the legislature. One wonders what ex-Senator Spooner, or Senator Bacon of Georgia. would say to such an abandonment of the orthodox tradition as to the separation of powers! The proposal is but another instance of the tendency, of which I was speaking a moment ago, to bring the governor and the legislature closer together.

The next set of offices to discuss would naturally be the judiciary—but I may as well admit that this is an issue which I am going to avoid. The problem of an elective versus an appointive judiciary has been discussed almost ad nauseam, with the clear weight of *authority*, as far as the general question is concerned, on the side of those who favor appointment. In so far as a new problem is being created, or an old problem intensified, by the increasing tendency of American courts to exercise what is indisputably a policy-determining function, this new element in the situation is by no means suffering from any lack of discussion, nor is it likely to in the near future. I trust, therefore, that you will not be disposed to censure the omission.

I might note, however, that the special argument, just suggested, for popular election does not apply to chancery or probate courts or to inferior local courts. As to the method of selecting judges for these positions, Mr. Dorman B. Eaton's suggestion[9]—namely, that they be appointed by the judges of the higher courts, very much as commissioners are appointed by federal circuit courts for acting as magistrates throughout the United States—is worthy of serious consideration. As Mr. Eaton points out, there is a precedent for such a step in the constitution of the United States.

We come finally to local officers, among whom I shall consider only those of the county—the short ballot principle in its relation to city officers having often been discussed, and recently carried into practice in a number of cities. There are, first, the county commissioners or supervisors, elected at large, or by towns, or by special districts. In so far as the county is permitted to exercise any legislative power, such power is usually exercised by this county board. It is properly the policy-determining organ of the county for local affairs. There will be little question, therefore, as to the propriety of its direct selection by the voters.

Just as little can there be any doubt—after what we have concluded in the case of the administrative officers of the state—that a large

[9] *The Government of Municipalities*, p. 444, ff.

group of county officers, now elective, should be transferred to the appointive class. This group includes coroners, registers of probate, registers of deeds, clerks of court, county clerks, county assessors, county treasurers, county surveyors, superintendents of schools, superintendents of the poor, county health boards and similar officers. That there was some realization, even in the days when Jacksonian democracy was rampant in the land, of the danger of making such minor officers elective, is shown by the following excerpt from the debates in the New York constitutional convention of 1846. Mr. Simmons, speaking, as the context shows, with some warmth:

> There seemed to be a wonderful charm in adding names to the ticket. The complaint in his county was that there were so many elective officers—because it imposed on the people so much labor. He heard a gentleman from Clinton county say—and he lived among a very intelligent population too—that there were so many names on the town ticket now, that he would pledge $100 that he could get his horse elected supervisor, and nobody would know it.[10]

But to come back to the matter in hand. Most of the officers just mentioned are, at present, distinctively local officials, though increasingly subject to state supervision. It is therefore proper that they should be appointed either by the county board, or, if it be desired to centralize responsibility as in state and city, by a chief executive officer to be created for the county. There is already some precedent for this latter method in various parts of the country.[11] It is also interesting to note that the solution adopted in the Oregon plan above referred to is along this line. Article VI of the Constitutional amendments reads in part as follows:

> SECTION 1. The legal voters of each county shall choose a board of three directors of county business to serve for four years. Their official title shall be the "board of directors for the County of———." The first election of directors shall be at the November election, A.D. 1912, for four years; thereafter their term of office shall be six years, beginning with the board to be elected in November, 1916, subject always to recall petition. More than one of the members may be included in one recall petition if the causes of complaint are the same.

[10] Croswell and Sutton's *Debates of the New York Constitutional Convention of 1846*, p. 390.

[11] Cf. Fairlie, *Local Government in Counties, Towns and Villages* (American State Series), p. 79, and the authorities there cited. See also Professor Fairlie's conclusions as to the election of various county officers, pp. 115, 117 and 131.

The legislative assembly shall forthwith provide by law for the election of the board from the county at large. The method of election shall be such that any candidate who is the choice of so many as one-third of the electors of the County actually voting for directors shall thereby be elected. . . . The directors shall receive such compensation as is now paid to the county commissioners until that shall be changed by the voters of the county.

SECTION 2. It is the duty of the board of directors to plan and order all the public affairs and interests of the county. The board shall make all expedient rules and regulations for the successful, efficient and economic management of all county business and property, subject to the constitution and laws, and subject also to the vote of the people of the county. The board shall employ a county business manager, who shall be the chief executive of the county. He shall be a citizen of the United States, but the board shall not be limited to Oregon in seeking a man for the position.

SECTION 3. The salary of the county business manager and of all other county employees shall be in the discretion of the board of directors, except in so far as the same may be fixed from time to time by the legal voters of the county. No salaries of county officers shall be fixed by the legislative assembly. All subordinate officers and employees of the county shall be employed by the county business manager, except only that the board shall either audit the county bills or appoint a county auditor. The county business manager shall not be a member of the board. The county judge, justices of the peace and constables, so long as the law provides for such officers shall not be within the jurisdiction of the county business manager, nor of the board of directors, and their compensation shall be as now provided by law until changed by vote of the people of the county.

For coroners, registers and clerks of court Mr. Dorman B. Eaton has suggested the same method of appointment by the higher state judges as that above mentioned in the case of local judges.[12]

To the office of county auditor the same considerations are applicable as were submitted in the case of the *state* comptroller or auditor. Some day, however, we may come to the point of letting this latter official audit local accounts, just as the local government board audits those of all local organs of government in England except the borough. There is some evidence of a tendency in this direction in the plan for uniform local accounts and state supervision adopted in Ohio, and in the powers of investigation into local finances recently given to the comptroller in New York state.

It is when we come to the distinctly law-executing officers of the county—the sheriff and the district attorney—that the most difficult

[12] *The Government of Municipalities*, p. 455.

problem must be met. Owing to the combination of legislative centralization and administrative decentralization which Professor Goodnow has so fully analyzed and discussed,[13] there is no doubt that these officers are now, in practice, policy-determining, and express the will of the local community. If we answer that it is entirely improper that they should be so, the question then arises: is it feasible at the present time to deprive them of such power? In their case, merely to take them off the ballot and make them appointive is not, in itself, going to accomplish this result. The original problem is complicated by the introduction of another—that of the proper distribution of powers between the central and local organs of government. Suppose that, without changing the attendant conditions, you took the selection of sheriffs and district attorney in rural counties, and of district attorneys in urban counties, away from "the people" and conferred it upon the local appointing authority, where the control of the police department in cities is often located. This would certainly be an improvement over the present method. It would shorten the ballot and concentrate responsibility; but instead of settling the whole question, it would merely transfer the power improperly to determine local policy from the local law enforcing officers to the local appointing authority. Logically this latter problem does not concern the immediate question which we are discussing. Practically the failure to settle it would, I think, tend to keep both questions open—that of the method of selecting officers, as well as that of the apportionment of state and local functions. The power to dispense informally with the execution of state laws, whether that power be vested in sheriffs and district attorneys, or in mayors and county boards, will always tend to produce corruption and bad local government. Such conditions, as we have seen in the attempt to regulate the liquor traffic, are apt to result in the demand for increased administrative centralization, which, again, is thoroughly desirable within reasonable limits, but which is far from offering a complete solution of the problem. Take what has actually happened in numerous cases. The demand for centralization has been answered at first by the establishment of optional state control over the action of local officers. As this has proved ineffectual, a more drastic, permanent control has been substituted. A state constabulary has been created, or the officers who control the police forces of cities have been made appointive

[13] *Politics and Administration*, chap. v.

and removable by the governor. In the long run, however, the attempt, by means of increased administrative centralization, to deprive the local community of its informal policy-determining powers in matters where the desire for local autonomy was intense has everywhere broken down. Centralization had to be made more and more drastic, and the state was forced on from one point to another until it was compelled to take over most of the powers of local government to an extent which public opinion refused to support. On the other hand, in Massachusetts, after the attempt to override local sentiment had been given up, the state-appointed police were found to be most valuable and efficient for the enforcement in local communities of all general state laws which were backed up by local opinion, or which, whether local opinion favored them or not, the average public opinion of the state was determined to have enforced.[14]

This seems to indicate the general lines on which the problem must be solved. Give the locality power to determine its own policy in such matters as the sale of liquor, the suppression of gambling, etc., and, even at the expense of all theories as to the proper distribution of state and local powers, make your statute book represent effective public convictions, and not merely what Mr. Jerome calls "moral yearnings." Make your local community in this way reasonably reconciled to its laws; take away the fear that admininstrative centralization means dragooning it into submission on highly controverted questions, and you will remove a large part of the present local prejudice against appointment by some state authority of the local law-enforcing officers. There is no question but that theoretically the latter are state, rather than local officials, and should be centrally appointed.[15] If it became practically expedient, as for example in cities, logic might be satisfied by the local appointment of a separate officer for the enforcement of local ordinances—in New York City the corporation counsel could easily be developed in this direction; but probably if the locality were allowed more voice in determining the policies to be applied to it, it would care much less whether or not a state officer executed them.

Before this system of central appointment could be deemed thoroughly desirable, however, another danger would have to be guarded

[14] On this whole question cf. C. M. L. Sites, *Centralized Administration of Liquor Laws*, Columbia Univ. Studies in History, Econ., and Pub. Law, vol. x, no. 3, 1899.

[15] Cf. the Oregon plan; constitutional amendments, art. v, sec. 5.

against. In the appointment of state officers the importance of the positions and the attendant publicity, as well as the increasing need for a high degree of efficiency, would probably tend to prevent improper partisan influences from playing too large a part. The same would probably hold true, though to a less degree, in regard to the local appointment of local officials. In the case of local officers appointed by the governor, however, these safeguards would be far less available. Experience shows that the danger of local patronage being used to build up a state machine is no imaginary one. In the federal government, for example, it is in the case of the marshalls and postmasters, not in that of cabinet officers, that partisanship most often causes bad selections. As for the experience of the states, even overlooking, as imperfectly analogous, the history of the New York council of appointment, a quotation from the debates in the New York convention of 1846 will show what happened when the governor appointed county judges. Mr. Patterson speaking:

"How were judges appointed now? The constitution, it was true, conferred the power of appointment on the governor and senate; but did they exercise that power in point of fact in the selection of judges? By no means. The judges of your county courts were not appointed by the governor and senate. Practically they were appointed by a caucus, held in the county where the judges were to officiate. The people got together in caucus and then made their nominations for the office of judges of the county court, and these names were sent to the governor. And what governor ever refused to send in these names for confirmation to the senate? And what senate had we had that had declined to confirm nominations thus made through a caucus of the party of the executive? Whichever party had the governor they made their caucus nominations, and that was virtually an appointment. Mr. Patterson recollected a few years ago—and he had had occasion to relate the circumstance to a smaller body than this, in this city—some gentlemen in Franklin county got together and resolved themselves into a democratic-republican county convention—A. B. was called to the chair, and C. D. appointed secretary—and it was found that E. F. and G. H. had a majority of all the votes—and it was, therefore, resolved unanimously that they be recommended to the governor as judges. The proceedings were sent down here in due form to the governor—this was in 1834—and he supposed, seeing that it was a democratic-republican convention, that it was all right. That was strong enough to suit Governor Marcy, and he sent E. F. and G. H. to the senate and they confirmed the nominations—when it turned out that he had appointed a couple of whigs instead of a couple of democrats. (Laughter.) This was a practical illustration of the mode of appointing judges

that had been in vogue some twenty years. Mr. Patterson knew not whether similar tricks had been played off on other governors. It was enough to know that governors would swallow what was sent to them in this way, if they were only the right kind of names.[16]

In the debates of the Pennsylvania convention of 1838 we find a similar statement—all the more striking because it was meant for a defense of the governor against those who charged him with misusing his then very extensive patronage, Mr. Banks speaking:

He knew it had been the practice with governors of Pennsylvania, when members of the legislature presented to them letters of recommendation for officers in their counties, justices of the peace, judges and other officers, for the governor to say to them: "Gentlemen, if you are desirous that this man should be appointed, endorse this paper. I know nothing of his character, but, if you will give your names it will be some guarantee for his character." Well, when members of the legislature impose upon the governor, is he to be charged with a violation of his duty, or is he to be condemned for a dereliction of duty when he has taken all the pains in his power to ascertain the character of these men before they were appointed? But the governor has been imposed upon in many instances, and the people have become dissatisfied in consequence of these impositions, ...[17]

In another speech in this same debate Mr. Sergeant, the president of the convention, stated that many of the governor's appointees to local offices were selected as a reward for campaign services, and were not only illiterate, but so totally unqualified for their positions that it was a common practice for them to hire deputies to perform their duties for them, while they devoted themselves to building up a political machine in the county.

In Florida the constitution of 1868 provided for the appointment of many of the county officers by the governor. Perhaps this provision was put in by the republicans to assist them in retaining control of the state. At any rate, after democrats recaptured the govenorship in 1876, the process of selecting local officers, according to Professor Fairlie's description, was as follows:

In practice, ... the formal method of appointment was a device for preventing negro control of local offices in the "Black Counties." On election day, democratic primary elections were held in separate polling places for nominating candidates for the

[16] Croswell and Sutton's *Debates, etc.*, pp. 102–3.

[17] *Proceedings and Debates of the Pennsylvania Constitutional Convention of 1837–8*, reported by John Agg; vol. ii, p. 312.

various appointive offices, and the candidates thus chosen were regularly appointed to the positions. When the negro vote had been eliminated, the elective system was restored[18]

—this was in 1885. It has also been shown that, when, in prohibition states, the governor was given power to appoint the police boards of cities, he often used this power to build up a party or personal machine.[19]

For these reasons it is essential to devise some method by which local officers appointed by the governor shall be chosen on the basis of efficiency, and retained in office as long as their efficiency continues. Indeed, in the case of all the offices transferred to the appointive class, the establishment of some system of this sort in connection with the change in the method of selection is a matter of the greatest importance. The attempt which has been made in the Oregon proposals to grapple with this problem is interesting. Section 10 of Article 5 of the amendments reads as follows:

Appointment or removal of any officer or employee, because of personal preference, or for political or party advantage, or because of membership in a party, or for any reasons of partisanship, is hereby condemned and prohibited. All the governor's cabinet officers except the state business manager are excepted from this section. On every appointment or removal of a public officer or employee the officer making the appointment or removal shall certify that he has not made it because of personal preference, friendship, favor, or dislike, nor because of or for the advantage of any political party, faction or association; nor on account of membership or political activity in any political party or organization, except only in the case of the above members of the governor's cabinet.

It is hard to see how this provision can be expected to prove a real or satisfactory solution of the problem. It is more in the nature of a pious exhortation to the appointing authority than of those shrewd devices by which our Anglo-Saxon forefathers have been wont to remedy defects in their government. The natural solution, and the one which, in spite of its disadvantages, offers the greatest practical hope of success, is along the lines already mapped out by the civil service reformers. In the case of district attorneys, especially if their appointment were to be given to the attorney general, the legal requirements of the position might prove sufficient to compel the selec-

[18] *Local Government, etc.*, p. 50.

[19] Cf. Sites, *op. cit.*, pp. 77–8.

tion of reasonably competent men. The ordinary rules of the classified civil service could hardly be applied to such offices. The rules recently established for the diplomatic and consular services, in regard to classification, transfers and promotions might, however, be applicable to some extent. In the case of the sheriff, or of such locally appointed officers as the county clerk, county treasurer, register of deeds, etc., there seems to be no reason why the present civil service laws of New York state could not be made use of. If the system employed in the Philippines, of appointing the higher officers in the departments only from among the next lower grades, and on the basis of their records in the service, proves all that is hoped, it may eventually offier a model for some of the state offices. In this direction, as is well known, there are still many problems to be solved, but the progress of the short ballot movement will necessarily be bound up with, and to some extent dependent upon, the further development of civil service reform.

There may, however, be a limit to the extent to which party patronage should be cut down, until the parties have had a chance to accustom themselves to the new conditions. Undoubtedly the reduction in the number of elective offices will decrease the amount of machinery which the parties will have to maintain, and therefore lessen the need for patronage. Also, if the plan for state payment of campaign expenses can be satisfactorily worked out, this will furnish a new means of party subsistence, and thus work toward the same end. The amputation of some of its overweight of "organization" will undoubtedly leave the party freer to turn its attention to policies, and to that direction and control of government action which is the essence of real party government. As long as the departments of government remain separate, however, and to some extent in need of having their action coördinated and unified by forces working from without, the party, as the chief of these forces, must be kept strong and efficient. Long before there were many elective offices to fill, the use of patronage for party purposes had been developed in Pennsylvania and New York to a tremendous extent—indeed, strange as it may seem to us now, it was in the hope of curing this abuse that so many offices, theretofore appointive, were made elective in 1838 and 1846. Doubtless when such issues as slavery and the right of secession were still unsettled, when the nationalizing influence of party was far more requisite than it is today, and the demands for administrative efficiency infinitely less, there were reasons which no longer exist for the sacrifice of this efficiency to the upbuilding of

powerful party organizations. Also, even for that time, the use of patronage for party purposes was probably excessive, and far beyond what legitimate party needs demanded. All that I wish to suggest in this connection is that a return to the type of governmental structure which we started out with may not at once place our parties in a position where the use of patronage will be entirely unnecessary. However much may be accomplished, therefore, in this direction, we must remember that the political habits of generations cannot be unlearned in a day. If the necessary work of the party organizations is not to suffer, the means of support to which they are accustomed must not be too suddenly withdrawn.

There are many other phases of this subject which one is tempted to discuss—especially some of the collateral effects which may be expected from a reduction in the number of elective offices, and which, in turn, may be expected to react upon the governmental system and therefore influence us in our decision as to just what offices should now be made appointive. No thoroughgoing change of this kind can be put through without a considerable dislocation of that whole complicated series of adjustments which go to make up the organized political life of a community. To venture out into this field, however, would take one far beyond the limits of a paper of this kind—limits, which, in my case, I fear, have already been exceeded; but the short ballot is a question the practical public discussion of which has only begun, and anyone who is interested in continuing this discussion may rest assured that for years to come he will have ample opportunities for doing so.